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Chee Kuat Lin v Majlis Peguam

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R4–17–15 OF 2009
ALIZATUL KHAIR J
10 MAY 2012

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Legal Profession — Disciplinary proceedings — Disciplinary committee — Appellant ordered to be struck off roll — Appeal to High Court — Whether appellant failed to disclose all relevant facts when petitioning for admission to Bar — Whether appellant deliberately misled respondent into believing he was not gainfully employed — Whether misconduct proven — Whether disciplinary board's findings ought to be set aside — Sentence — Whether one year suspension was just and appropriate — Legal Profession Act 1976 ss 30(1)(c), 94(3)(j), (k) & (o) — Legal Profession (Practice and Etiquette) Rules 1978 r 44(b)

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The appellant, an officer of the Royal Malaysian Police, had applied for admission to the Bar to practise as an advocate and solicitor whilst he was interdicted from duty as a police officer pending investigations on suspicion of accepting a bribe. After his admission to the Bar, the appellant had worked as a legal assistant and later commenced practice as a sole proprietorship. The respondent issued a show cause letter to the appellant for his failure to disclose the fact that he was under suspension and was still employed as a police officer when he filed his petition papers to gain admission to the Bar. The appellant denied any misconduct on his part and claimed that he had prior to his admission disclosed all relevant information in his petition papers. Upon reviewing the appellant's papers, the respondent found no evidence of any disclosure by the appellant of the fact that he was a police officer and was interdicted pending investigation whether prior to his admission to the Bar or during his practise as an advocate and solicitor. The respondent thus lodged a complaint against the appellant to the disciplinary board ('the DB'). The complaint was two pronged, in that it claimed that the appellant had prior to his admission to the Bar failed to disclose to the respondent the fact that he was under suspension and was still employed as a police officer; and that the appellant had knowingly breached s 30(1)(c) of the Legal Profession Act 1976 ('the Act') and r 44(b) of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'). The disciplinary committee ('DC'), appointed by the DB, conducted an investigation into the complaint and recommended that the appellant be struck off the roll. The DB ordered the appellant to be struck off the roll. This was the appellant's appeal against the order of the DB. It was the appellant's case that there was no merit in the respondent's submission that the appellant had deliberately withheld information that he was a police officer interdicted from duty; that the respondent had failed to prove beyond a

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reasonable doubt that the appellant had committed a misconduct under s 94(3)(j), (k) and (o) of the Act; and that he was not a 'full-time salaried employee' of the police force when he was practising as an advocate and solicitor. According to the respondent, failure on the appellant's part to disclose the fact of his suspension resulted in it being deprived of whether to object to the appellant's admission to the Bar. It was thus the respondent's case that the appellant was fully aware that he was not supposed to practise as an advocate and solicitor whilst under suspension and that he had deliberately misled the respondent into believing that he was not gainfully employed.

Held, substituting the order of the DB with no order as to costs:

(1) The first part of the respondent's complaint to the DB and the subsequent finding of the DB related to the appellant's conduct prior to his admission to the Bar. However, s 94(3) only applied to misconduct committed by an advocate and solicitor and not by a person who was yet to be admitted to the Bar. Thus, the complaint did not relate to the appellant's conduct as an advocate and solicitor as defined under s 2 of the Act and as contemplated by s 94(3) of the Act. Consequently the appellant could not be said to be guilty of misconduct under s 94(3)(j), (k) and (o) of the Act for failing to disclose the fact of his suspension from the police force when applying for admission to the Bar. As such, this court set aside the DB's finding of guilt for misconduct under s 94(3)(j),(k) and or (o) of the Act (see para 47).

(2) It was abundantly clear that based on the factual matrix of the case and the nature of the complaint against the appellant that the respondent should have acted under s 17(3) of the Act (see para 51).

(3) This court agreed with the respondent's finding that the appellant had acted in breach of s 30(1)(c) of the Act when he applied for a practising certificate in 2005 as he was then still a member of the police force and gainfully employed. As the appellant had breached s 30(1)(c) of the Act and r 44(b) of the Rules, the DB had correctly found the appellant to be guilty of misconduct under s 94(3)(j), (k) or (o) of the Act. The finding of the DB on this issue was upheld by this court (see para 65–66).

(4) Based on the finding that the appellant was guilty of misconduct under s 94(3)(j),(k) and or (o) of the Act for not disclosing the fact of his suspension at the time of his admission, the DB ordered that he be struck off the roll. However, this court found that the DB was wrong in holding that the appellant was guilty of misconduct under s 94(3)(j), (k) and or (o) of the Act for not disclosing the fact of his suspension at the time of his admission. Nevertheless, the appellant had breached s 30(1)(c) of the Act and r 44(b) of the Rules, which was misconduct that was fairly serious. In the circumstances, this court ordered the DB's order to be set aside and substituted with a suspension from practise for 1 year (see para 68 & 70).

A **[Bahasa Malaysia summary**

Perayu, seorang pegawai Polis diRaja Malaysia, telah memohon kemasukan ke dalam Badan Peguam untuk beramal sebagai peguambela dan peguamcara sementara dia ditahan kerja daripada tugas sebagai pegawai polis sementara selesai siasatan atas tuduhan menerima rasuah. Setelah kemasukannya dalam Badan Peguam, perayu telah bekerja sebagai pembantu undang-undang dan kemudian beramal sebagai pemilik tunggal. Responden telah mengeluarkan surat tunjuk sebab kepada perayu kerana kegagalannya mengemukakan fakta bahawa dia digantung kerja dan masih bekerja sebagai pegawai polis ketika dia memfailkan kertas petisyennya untuk diterima masuk ke Badan Peguam. Perayu menafikan apa-apa salah laku di pihaknya dan mendakwa bahawa dia telah mengemukakan semua maklumat relevan dalam kertas petisyennya sebelum kemasukannya. Setelah meneliti kertas perayu, responden mendapati tiada keterangan berhubung apa-apa pendedahan oleh perayu tentang fakta bahawa dia seorang pegawai polis dan ditahan kerja sementara selesai siasatan sama ada sebelum kemasukannya dalam Badan Peguam atau semasa dia beramal sebagai peguambela dan peguamcara. Responden dengan itu telah membuat aduan terhadap perayu kepada lembaga tatatertib ('LT'). Aduan itu terbahagi dua, di mana ia mendakwa bahawa perayu telah sebelum diterima masuk dalam Badan Peguam gagal mengemukakan fakta bahawa dia digantung dan masih bekerja sebagai pegawai polis; dan bahawa perayu mengetahui dia telah melanggar s 30(1)(c) Akta Profesion Undang-Undang 1976 ('Akta') dan k 44(b) Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etika) 1978 ('Kaedah'). Jawatankuasa Tatatertib ('JT'), yang dilantik oleh LT, telah melakukan siasatan berhubung aduan itu dan mensyorkan agar perayu dikeluarkan daripada daftarai. LT telah memutuskan perayu dikeluarkan daripada daftarai. Ini adalah rayuan perayu terhadap keputusan LT. Ia adalah kes perayu bahawa tiada merit hujah responden bahawa perayu sengaja menyekat maklumat bahawa dia seorang pegawai polis; bahawa responden telah gagal untuk membuktikan melampaui keraguan munasabah bahawa perayu telah melakukan salah laku di bawah s 94(3)(j), (k) atau (o) Akta; dan bahawa dia bukan pekerja bergaji penuh dalam pasukan polis apabila dia beramal sebagai peguambela dan peguamcara. Menurut responden, kegagalan di pihak perayu untuk mendedahkan maklumat tentang fakta penggantungan kerjanya menyebabkannya terkilan sama ada untuk membantah atau menerima kemasukan perayu ke dalam Badan Peguam. Oleh itu adalah kes responden bahawa perayu menyedari dia tidak sepatutnya beramal sebagai peguambela dan peguamcara semasa digantung kerja dan telah mengelirukan responden yang mempercayai bahawa dia tiada pekerjaan bergaji.

Diputuskan, menggantikan keputusan LT dengan tiada perintah terhadap kos:

(1) Bahagian pertama kepada aduan responden kepada LT dan penemuan

seterusnya oleh LT berkaitan perilaku perayu sebelum kemasukannya dalam Badan Peguam. Walau bagaimanapun, s 94(3) hanya terpakai untuk salah laku yang dilakukan oleh peguambela dan peguamcara dan bukan oleh seseorang yang belum diterima masuk dalam Badan Peguam. Oleh itu, aduan itu tiada kaitan dengan perilaku perayu sebagai peguambela dan peguamcara sebagaimana ditafsirkan di bawah s 2 Akta dan sepertimana dijangka oleh s 94(3) Akta. Berikutan itu perayu tidak boleh dikatakan bersalah kerana salah laku di bawah s 94(3)(j), (k) atau (o) Akta kerana gagal mengemukakan fakta tentang penggantungannya daripada pasukan polis ketika memohon kemasukan dalam Badan Peguam. Oleh itu, mahkamah ini mengetepikan penemuan LT kerana kebersalahan salah laku di bawah s 94(3)(j), (k) dan atau (o) Akta (lihat perenggan 47).

(2) Adalah jelas bahawa berdasarkan matriks faktual kes ini dan sifat aduan terhadap perayu bahawa responden patut bertindak di bawah s 17(3) Akta (lihat perenggan 51).

(3) Mahkamah ini bersetuju dengan penemuan responden bahawa perayu telah bertindak melanggar s 30(1)(c) Akta apabila dia memohon sijil beramal pada tahun 2005 semasa dia masih anggota pasukan polis dan masih bekerja dengan gaji. Oleh kerana perayu telah melanggar s 30(1)(c) Akta dan k 44(b) Kaedah, LT dengan betul mendapati perayu bersalah kerana salah laku s 94(3)(j), (k) atau (o) Akta. Penemuan LT berhubung isu ini dikekalkan oleh mahkamah ini (lihat perenggan 65–66).

(4) Berdasarkan penemuan bahawa perayu bersalah kerana salah laku di bawah s 94(3)(j), (k) dan atau (o) Akta kerana tidak mendedahkan fakta berhubung penggantungannya pada masa kemasukannya, LT telah memerintahkan agar dia dikeluarkan daripada daftarai. Walau bagaimanapun, mahkamah ini mendapati bahawa LT salah kerana memutuskan bahawa perayu bersalah kerana salah laku di bawah s 94(3)(j), (k) dan atau (o) Akta kerana tidak mendedahkan penggantungannya pada masa kemasukannya. Begitupun, perayu telah melanggar s 30(1)(c) Akta dan k 44(b) Kaedah, yang mana salah laku yang dianggap agak seruis. Dalam keadaan tersebut, mahkamah ini memerintahkan keputusan LT diketepikan dan diganti dengan penggantungan daripada amalan selama satu tahun (lihat perenggan 68 & 70).]

Notes

For cases on disciplinary committee, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1472–1476.

Cases referred to

Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia [2001] 4 MLJ 381, HC (refd)

SRC Augustin, Re [1973] 1 MLJ 208 (refd)

Syed Mubarak bin Syed Ahmad v Majlis Peguam Malaysia [2000] 4 MLJ 167, CA (refd)

Legislation referred to

Legal Profession Act 1976 ss 2, 17(3), 30(1)(c), 94(1), (2), (3)(j), (3)(k), (3)(o), (5), 99(3), 103(1)(c)(iii)

Legal Profession (Practice and Etiquette) Rules 1978 r 44(b)

Police Act 1967 s 78(1), (2), (3)

(Wong Kian Kheong) for the appellant.
(Shearn Delamore & Co) for the respondent.

Alizatul Khair J:

[1] This is an appeal by way of originating motion by the appellant against the order of the Disciplinary Board ('DB') dated 13 February 2009 ordering the appellant to be struck off the roll of the advocates and solicitors of the High Court of Malaya ('the said order'). The appellant is seeking to set aside the said order.

MATERIAL FACTS

[2] The material facts in this case are largely undisputed and they are as follows.

[3] The appellant was at all material times an officer of the Royal Malaysian Police.

[4] The appellant was interdicted from duty on 13 July 2004 pursuant to s 78(1) of the Police Act 1967 pending investigations by the Anti-Corruption Agency ('ACA') on suspicion of accepting a bribe.

[5] On 6 August 2004, the appellant filed his petition for admission to the Bar. The petition was served on the respondent on 23 September 2004.

[6] On 30 January 2004, the appellant applied to the respondent for exemption from pupilage for any period.

[7] On 26 November 2004, the respondent granted the appellant exemption from pupilage for a period of six months.

[8] On 22 April 2005, the appellant was admitted as an advocate and solicitor of the High Court of Malaya without any objections from the respondent.

[9] After the appellant's admission to the Bar, he practiced as a legal assistant with Messrs Shariff & Som.

[10] On 17 December 2005, the appellant resigned as legal assistant with Messrs Shariff & Som.

[11] On 30 November 2005, the appellant applied to set up a sole proprietorship firm under the name and style of Messrs KL Chee & Co.

[12] The respondent allowed the appellant's application and from 1 January 2006, the appellant commenced practice as a sole proprietorship under the name Messrs KL Chee & Co.

[13] On 28 March 2006, the Johore Bar Committee forwarded a letter dated 17 March 2006, from the Royal Malaysian Police, Johore Bahru to the respondent which in essence raised the following enquiry (query):

> How could the appellant have undergone pupilage, be admitted to the Bar and gone on to practice under his own firm when the appellant had been interdicted from duty as a police officer since 13.7.2004 pursuant to section 78(1)of the Police Act 1967 pending investigation on suspicion of accepting a bribe, which investigation was still pending.

This query forms the genesis (as the respondent puts it) of the respondent's complaint against the appellant.

[14] On 6 September 2004, the respondent wrote to the appellant seeking an explanation of this matter and whether the same was disclosed to the Bar Council prior to the appellant's admission to the Bar (see p 40 of exh A36).

[15] On 22 September 2006, the appellant replied to the following effect:

(i) the ACA in Johor had completed their investigations and no further action had been taken since;

(ii) that he had prior to his admission disclosed all relevant information in his petition papers (see Page 41, of Exhibit A-36).

Vide letter dated 9 October 2006, the appellant informed the respondent that he would cease practice with immediate effect.

A **[16]** On 30 October 2006 the respondent issued a show cause letter to the appellant for what the respondent alleged as the appellant's failure to disclose the fact that he was under suspension and was still employed as a police officer when he filed his petition papers and practiced as an advocate and solicitor, (see p 46 of exh A36).

B **[17]** On 15 November 2006, the appellant replied as follows:

(i) the appellant contended that he was not employed at the material time;

C (ii) the respondent was aware that he was a police officer at the material time as he had applied for and been granted an exemption from pupilage on the basis of his experience in the police force; and

(iii) he denied any misconduct on his part.

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[18] On 23 January 2007, the respondent lodged a complaint (the complaint) against the appellant to the DB pursuant to s 99(3) of the Legal
E Professions Act 1976 (LPA) having found, upon reviewing the appellant's papers, no evidence of any disclosure being made by the appellant of the fact that he was a police officer and was interdicted pending investigation,whether prior to his admission to the Bar or during his practice as an advocate and solicitor.

F **[19]** On 24 July 2007, the appellant submitted his written explanation to the DB (see pp 57–60, exh A36).

[20] Subsequently the DB appointed the Disciplinary Committee (DC) to
G conduct investigation into the complaint and after conducting hearings to investigate the complaint, the DC recommended that there was merit in the complaint and that the appellant be struck off the roll, (see pp 153–164, exh A36).

H **[21]** On 13 February 2009, the DB, upon considering the DCs report, ordered that the appellant be struck off the roll, (see p 166, exh A36).

THE COMPLAINT

I **[22]** Based on the respondent's letter to the Bar Council dated 23 January 2007, the respondent's complaint against the appellant is, in the words of the appellant, two-pronged:

(a) prior to the appellant's admission to the Bar, the appellant had deliberately

withheld the following information from the Respondent knowing that the information would affect the respondent's decision on whether to object to the respondent's admission to the Bar —

(i) the appellant was still an active member of the police force; and

(ii) the appellant was under suspension pending investigation by theACA.

(b) The appellant knowingly breached section 30(1)(c) of the LPA and Rule 44(b) of the Legal Profession (Practice & Etiquette) Rules 1978 (the said Rules) by practicing as an advocate and solicitor when at all material times the appellant was 'gainfully employed' as a police officer with the Royal Malaysian Police.

[23] It was contended by the respondent that by reason of the above complaint, the appellant was guilty of 'misconduct' as defined under s 94(3)(j), (k) and (o) of the LPA.

THE APPELLANT'S CONTENTION

[24] The appellant contended as follows:

(i) the DC had committed an error of law by relying on section 17(3)of the LPA;

(ii) the Appellant has no duty to disclose that he was under suspension pending investigation by the ACA;

(iii) there was no merit in the Complaint in paragraph (a) above as the Respondent had failed to prove beyond reasonable doubt that the Appellant had committed a 'misconduct' under section 94(3)(j), (k) and/or (o) of the LPA;

(iv) the Appellant is not an 'employee' and hence, section 30(1)(c)of the LPA and subrule 44(b) do not apply; and

(v) the Appellant was not 'gainfully employed' and nor was the Appellant a 'full-time salaried employee'.

A THE RESPONDENT'S CONTENTION

[25] In their submission the respondent emphasised that the respondent's complaint against the appellant vis-a-vis his admission to the Bar was not that he was gainfully employed as a police officer during his pupilage but that he failed to disclose the fact of his suspension to the respondent when applying for admission to the Bar.

[26] In this regard it is the contention of the respondent that whilst there is no specific legal provision requiring the appellant to disclose the fact of his suspension to the respondent, the appellant nevertheless has a duty to make such disclosure.

[27] This is evident from the petition itself which specifically provides as follows:

> I confirm that all the above particulars are correct I understand that the Bar Council needs the fullest possible particulars of myself in order to ascertain my suitability for admission as an Advocate and Solicitor of the High Court, Malaya.

[28] The respondent also relied on the following cases in support of their contention that there is a duty on the petitioner when applying for admission to the Bar to ensure that he is qualified and that this duty includes the duty to disclose all relevant facts to the respondent:

(a) *Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2001] 4 MLJ 381 (*Akberdin*); and

(b) *Re SRC Augustin* [1973] 1 MLJ 208.

[29] According to the respondent, failure on the appellant's part to disclose the fact of his suspension resulted in the respondent being deprived of the right to decide whether or not to object to the appellant's admission.

[30] As to the complaint under para (b) above, that the appellant knowingly breached s 30(1)(c) of the LPA and r 44(b) of the said Rules, the respondent relied on the case of *Syed Mubarak bin Syed Ahmad v Majlis Peguam Malaysia* [2000] 4 MLJ 167 (*Syed Mubarak*) to contend that the appellant was gainfully employed at the time that he applied for a practicing certificate.

[31] The respondent argued that based on the undisputed fact that even whilst under suspension, the appellant:

(a) was still considered to be a police officer;

(b) received half month salary and allowance from the police force; and

(c) was allowed to carry his police identification.

[32] The appellant was in fact gainfully employed when he practiced as an advocate and solicitor. The appellant therefore ought not to have applied for a practicing certificate. By doing so and subsequently practicing as an advocate and solicitor, the appellant, in the respondent's view had clearly violated s 30(1) of the LPA and r 44(b) of the said rules.

[33] The respondent further submitted that the appellant was fully aware that he was not supposed to practice as an advocate and solicitor whilst under suspension, and deliberately misled the respondent into believing that the appellant was not gainfully employed. This is clear from the following documents:

(i) Page 22 of Exhibit A-36

Under 'Job History', the Appellant stated '21 years plus service in the police force'.

(ii) Page 24 of Exhibit A-36

Under 'Years of Experience', the Appellant stated '22 years'. Under 'If experience is both pre and post qualification please state (A) period of prequalification experience' the Appellant stated '1982-1998'.

(iii) Page 25 of Exhibit A-36

In the last sentence in paragraph 3, the Appellant stated '*I also conducted prosecution in the Sessions Court in Johor Bahru besides supervising my fellow prosecuting officers in the Magistrates Courts until I commenced my pupilage on 6.8.04 …*' (Emphasis added.)

(iv) Pages 127, 134 and 147 of Exhibit A-36

The Appellant made no mention about him still being a police officer.

[34] All the above documents according to the respondent were carefully orchestrated by the appellant so as to willfully deceive the respondent into believing that the appellant was no longer a police officer. This can only be because the appellant was well aware that he ought not to be practicing as an advocate and solicitor, as he was still a police officer.

DECISION

[35] After having carefully considered both the appellant's and respondent's

A submission and having perused the various affidavits including the exhibits, in particular exh A36, I made the following order:

(i) that the order of the DB ordering that the Appellant be struck off the Roll
B be substituted with the following order — that the Appellant be suspended for 1 year, on the following ground —

(a) the finding of the DB that the Appellant was guilty of misconduct under section 94(3)(j), (k) and/or (o)of the
C LPA for not disclosing, at the time he filed the petition that he was interdicted or suspended, from the police force, be set aside as the Appellant was not an advocate and solicitor at that point in time;

D (b) the DB's finding that the Appellant was guilty of misconduct under the said section 94(3)(j), (k) and/or (o)of the LPA, for being in breach of section 30(1)of the LPA and Rule 44(b) of the said Rules is upheld; and

E (ii) no order as to costs.

[36] I had granted a stay of my order upon appellant counsel oral application and there being no objections from the respondent's counsel. I was also satisfied
F there were special circumstances in this case that warranted a stay being granted.

REASONS

G **[37]** I had set aside the DB's finding of guilt for misconduct under s 94(3)(j), (k) and/or (o) of the LPA in respect of the appellant's failure to disclose the fact that the was interdicted (or suspended to use the respondent's term) from the police force at the time he applied for admission to the Bar because, as I had stated above, the appellant was not an advocate and solicitor at the material
H time.

[38] Section 94(1) of the LPA states as follows:

All *advocates and solicitors* shall be subject for the purposes of all disciplinary actions
I to the central of the Disciplinary Board.

(Emphasis added.)

[39] Under s 94(2), 'any advocate and solicitor' found guilty of any

misconduct shall be liable to be struck off the roll or suspended from practice for any period not exceeding five years.

[40] As to what amounts to 'misconduct', s 94(3) provides as follows:

> For the purposes of this Part 'misconduct' means conduct or omission to act in Malaysia or elsewhere by an *advocate and solicitor* in a professional capacity or otherwise which amounts to grave impropriety and includes—
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> (a) …
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> (b) …
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> (c) …
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> (d) …
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> (i) …
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> (j) the carrying on by himself, directly or indirectly, of any profession, trade, business or calling which is incompatible with the legal profession or being employed for reward or otherwise in any such profession, trade, business or calling
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> (k) the breach of any provision of this Act or of any rules made thereafter or any direction or ruling of the Bar Council;
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> (l) …
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> (m) …
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> (n) …

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being guilty of any conduct which is unbefitting of an *advocate and solicitor* or which brings or is calculated to bring the legal profession into dispute.

(Emphasis added.)

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[41] It is clear from the above provisions that s 94 deals with the power of the DB to exercise disciplinary control over an *advocate and solicitor* in relation to his conduct (or omission) in his capacity as such (ie in a professional capacity) or otherwise.

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[42] An 'advocate and solicitor' is defined in s 2 of the LPA as follows:

'advocate and solicitor', and 'solicitor' where the context requires means *an advocate and solicitor of the High Court admitted and enrolled* under this Act or under any written law prior to the coming into operation of this Act.

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(Emphasis added.)

[43] Thus based on the above definition of 'advocate and solicitor' the misconduct under s 94(3) in respect of which a person can be punished under s 94(2) of the LPA refers to conduct or omission by an advocate and solicitor of the High Court who has been admitted and enrolled under LPA the (or any previous written law).

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[44] In the present case the misconduct which the appellant was found guilty of under s 94(3)(j), (k) and/or (o) of the LPA was based on the respondent's complaint to the DB to the following effect:

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The Bar Council's complaint is that *the Respondent failed to disclose the fact of his suspension to the Bar Council when applying for admission to the Bar.*

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(see 'Report of the Disciplinary Committee. The Disciplinary Committee's Findings of Fact', p 163, exh A36). (Emphasis added.)

[45] After conducting a hearing into the complaint, the DC made the following finding:

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It is a finding of the Disciplinary Committee that the Respondent deliberately withheld the fact of his suspension to the Bar Council *knowing that is (sic) would affect the Bar Council's decision whether to object to the Respondent's admission to the Bar.*

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(see p 164, para 13, exh A36, 'Report of the Disciplinary Committee. The Disciplinary Committee's Findings of Fact').

[46] The abovesaid finding of the DC was duly affirmed by the DB with the

latter accepting the recommendation of the DC that the appellant 'be removed from the roll as advocate and solicitor pursuant to s 103 (1)(c)(iii) of the Legal Profession Act 1976'.

(see pp 164 and 166, exh A36).

[47] It is patently clear from the above that the complaint of the Bar Council (the respondent) to the DB and subsequently the finding of the DB relate to the appellant's conduct *prior to his admission to the Bar.* It does not relate to his conduct as an advocate and solicitor as defined under s 2 of the LPA and as contemplated by s 94(3) of the LPA. Consequently the appellant could not be said to be guilty of misconduct under s 94(3)(j), (k) and/or (o) of the LPA for failing to disclose the fact of his suspension from the police force when applying for admission to the Bar as s 94(3) only applies to misconduct committed by an advocate and solicitor and not by a person who is yet to be admitted to the Bar.

[48] To my mind given the nature of the complaint, the more appropriate provision under which the respondent could have acted was s 17(3) of the LPA. Section 17(3) of the LPA states as follows:

> *If at any time after the admission and enrolment of any petitioner as an advocate and solicitor,* it is shown to the satisfaction of the court that any petition, affidavit, certificate or other document filed by a petitioner containing any statement which is false or misleading in substance or a suppression if any material fact the name of the petitioner may be removed from the Roll.

(Emphasis added.)

[49] In the present case, it is not disputed that the discovery of the act complained of ie the concealment of the appellant's suspension from the police force, took place after the appellant was admitted and enrolled as an advocate and solicitor.

[50] It is also not in dispute that the appellant did not disclose this material fact of his suspension from the police force in his petition for admission. The appellant however disagreed that he was under a duty to disclose such fact in his petition, a view not shared by the respondent but that is another issue altogether and which I do not intend to deal with as it is not relevant for the purpose of determining whether or not the respondent should have acted under s 17(3) instead of instituting disciplinary action in respect of the complaint, of non disclosure of the appellant's suspension from the police force.

[51] In my view it is abundantly clear that based on the factual matrix of the case and the nature of the complaint against the appellant, s 17(3) of the LPA is the most appropriate provision under which the respondent could and

A should have acted. This was recognised by Abdul Aziz J (as he then was) in *Akberdin* when he pronounced to the following affect:

> In my judgment, the estoppel argument is hindered by s 17(3) of the Act, which provides as follows:
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> B
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> If at any time after the admission and enrolment of any petitioner as an advocate and solicitor, it is shown to the satisfaction of the court that any petition, affidavit, certificate or other document filed by a petitioner contains any statement which is false or a suppression of any material fact the name of the petitioner may be removed from the Roll.
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> C
>
> It recognises by implication that everything may have appeared to be alright to everybody at the time of admission, but yet something may be found to be not right after admission to that the advocate and solicitor covered is at risk of being removed from the roll.

D

[52] The respondent sought to rely on *Akberdin*'s case to support their proposition that the, the appellant has a duty to ensure that he was qualified before applying for admission to the Bar and that this duty includes the duty to disclose all relevant facts to the respondent.

E

[53] However as rightly pointed out by learned counsel for the appellant, the respondent cannot seek to rely on *Akberdin* to justify taking disciplinary proceedings against the appellant under s 94(3)(j), (k) and/or (o) of the LPA for breach of duty to disclose a material fact at the time of admission, when in *Akberdin* His Lordship Aziz Mohd J specifically referred to s 17(3) of the LPA in relation to such non-disclosure.

F

[54] In other words what His Lordship meant was that if, after an advocate and solicitor has been admitted, it was found that the advocate and solicitor concerned had, inter alia, failed to disclose or suppress any material fact at the time of admission as what had happened here, then the respondent can have recourse to s 17(3) and apply to the court to have the advocate and solicitor's name removed from the roll.

G

H

[55] As stated earlier the respondent in the present case did not follow this route. Instead it preferred a complaint to the DB in respect of the appellant's non disclosure (of his suspension from the police force) in his petition and proceeded to take disciplinary action against the appellant culminating in the latter being found guilty of misconduct under s 94(3)(j), (k) and/or (o) and being struck off the roll under s 94(2) of the LPA.

I

[56] For the reasons I have adverted to earlier, the respondent in my view was wrong in finding the appellant guilty of misconduct under s 94(3)(j), (k)

and/or (o) of the LPA in respect of the complaint that the appellant failed to disclose his suspension from the police force at the time of his admission to the Bar.

[57] I am also of the view that s 94(5) of the LPA is equally inapplicable as it is very clear from the order that can be imposed under the section that s 94(5) can only apply to a pupil who is yet to be admitted to the Bar.

[58] I however agree with the respondent's finding that the appellant had acted in breach of s 30(1)(c) of the LPA when he applied for a practicing certificate in 2005 as he was still then a member of the police force. The appellant only resigned from the Royal Malaysian Police on 26 February 2007.

[59] Section 30(1)(c) of the LPA provide as follows:

> (1) No advocate and solicitor shall apply for a practicing certificate-(c) if he is gainfully employed by any other person, firm or body in a capacity other then as an advocate and solicitor:
>
> Rule 44(b) of the said Rules states as follows —
>
> An advocate and solicitor shall not be a full-time salaried employee of any person, firm (other than advocate and solicitor or firm of advocates and solicitors) or corporation so long as he continues to practice and shall on taking up any such employment, intimate the fact to the Bar Council and take steps to cease to practice as an advocate and solicitor so long as he continues in such employment.

[60] Although the appellant did not dispute that he was a police officer when he applied for a practising certificate, he nevertheless contended that he was not a 'full-time salaried employee' of the police force when he practiced as an advocate and solicitor. This was because when he was under interdiction or suspension he was only receiving half of his salary and allowance pursuant to s 78(3) of the Police Act 1967.

[61] I am unable to agree with the appellant's contention. As submitted by learned counsel for the respondent, the words 'gainfully employed' were considered in the case of *Syed Mubarak*, where the Court of Appeal affirmed the decision of the High Court at p171 as follows:

> Adopting the *Concise Oxford Dictionary*'s definition of the word employ, two qualifications are required to be satisfied before one can be considered as employed. The first: is the use of the service of the person. The second: relates to payment of his service …

[62] And at pp 175–176:

> To return to the present instance, there can be little argument that the primary purpose of the Act is to regulate the legal profession. *The object of parliament is to maintain high standards in the profession. That is because the general public must have confidence in the integrity and the independence of the legal profession. It is obvious that parliament intended that persons who choose to be advocates and solicitors must exclusively practice as such.* If parliament intended that an advocate and solicitor should be permitted to practice more than one profession, one should be able to find clear language in which such permission is to be found.
>
> (Emphasis added.)

[63] As stated by the respondent counsel appellant did not dispute that even whilst under suspension:

(a) he was still considered to be a police officer;

(b) he received half month salary and allowance from the police force; and

(c) he was allowed to carry his police identification.

[64] In this regard s 78(2) of the Police Act 1967 is instructive:

> (2) The powers, privileges and benefits rested in a police officer interdicted under subsection (1) shall during his interdiction be in abeyance:
>
> Provided that such police officer shall continue to be subject to the same authority and discipline as if he had not been interdicted and *he shall not by reason only if such interdiction cause to be a police officer.*
>
> (Emphasis added.)

[65] I therefore agree with the respondent's submission that applying the principle and reasoning in *Syed Mubarak*, which decision is binding on this court, and based on the undisputed facts as shown in para (a), (b) and (c) above, the appellant was in fact gainfully employed when he practiced as an advocate and solicitor. I also agree that he ought not to have applied for a practicing certificate in the first place and that by doing so and subsequently practicing as an advocate and solicitor, the appellant had clearly breached s 30(1)(c) of the LPA and r 44(b) of the said rules.

[66] As the appellant had breached s 30(1)(c) of the LPA and r 44(b) of the said rules, the DB had correctly found the appellant to be guilty of misconduct under s 94(3)(j), (k) and/or (o) of the LPA. The finding of the DB on this issue

was accordingly upheld.

SENTENCE

[67] As regards the sentence imposed on the appellant, as I had found that the DB was wrong in holding that the appellant was guilty of misconduct under s 94(3)(j), (k) and/or (o) of the LPA for not disclosing the fact of his suspension from the police force at the time of his admission, I ordered that the DB's order that the appellant be struck off the roll be set aside and be substituted with a suspension from practice for one year.

[68] This was because I find that the main complaint by the respondent to the DB was the appellant's failure to disclose the fact of his suspension from the police force at the time he applied for admission to the Bar. It was primarily for that reason that the DC recommended and which recommendation was accepted by the DB that the appellant was ordered to be struck off the roll.

[69] This is evident from the DCs finding of facts in its report at p 164 exh A36 where it relied on *Akberdin*'s case to support its finding and recommendation on this issue.

[70] As regards the DB's finding that the appellant was guilty of misconduct under the said s 94(3)(j), (k) and/or (o) for being in breach of s 30(1)(c) of the LPA and r 44(b) of the said rules which finding I upheld, I did not think that a fine is appropriate as the misconduct which the appellant was found guilty of is fairly serious in nature. I also agree to a certain extent with the respondent that the appellant was fully aware that he was not supposed to practice as an advocate and solicitor whilst under suspension and had deliberately misled the respondent into believing that the appellant was not gainfully employed as apparent from the documents at pp 22, 24, 25, 127, 134 and 147 of exh A36 (see p 10 of the judgment).

[71] In the circumstances I was of the view that a sentence of suspension from practice for one year is just and appropriate.

Order of the DB substituted with no order as to costs.

Reported by Kohila Nesan